

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DENNIS BALL)	
Claimant)	
VS.)	
)	Docket No. 155,811
GEORGIA PACIFIC CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On August 13, 1997, the application of claimant for review of the Award of Special Administrative Law Judge William F. Morrissey, entered March 12, 1997, came on for oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Jeff K. Cooper of Topeka, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, James B. Biggs, appearing for Mark A. Buck, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Thomas D. Haney of Topeka, Kansas. There were no other appearances.

RECORD

The record is specifically set forth in the Award of Special Administrative Law Judge and is, herein, adopted by the Appeals Board.

STIPULATIONS

The parties have stipulated to the following elements of this claim:

- (1) Claimant's average weekly wage on January 25, 1985 was \$310.00.
- (2) Claimant's average weekly wage on June 23, 1988 was \$374.80.
- (3) Claimant's average base and overtime weekly wage on February 1, 1990 was \$392.80, and the value of claimant's fringe benefits was \$76.54.
- (4) Respondent paid 57.76 weeks temporary total disability compensation in the sum of \$11,378.54 for the January 25, 1985, date of accident and 85.73 weeks of temporary total disability compensation in sum of \$17,995.02 for the accident of February 1, 1990.
- (5) Written claim was timely filed for the accident of February 1, 1990.
- (6) Medical expenses were paid in the sum of \$14,646.25 for the accidents of January 25, 1985, and June 23, 1988.
- (7) Medical expenses in the sum of \$8,498.21 were paid for the accident of February 1, 1990.
- (8) The Kansas Workers Compensation Fund will pay 65 percent of the total award in this matter.

ISSUES

The nature and extent of claimant's injury and/or disability with respect to each injury are the only issues raised to the Appeals Board.

Additional issues dealing with whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on June 23, 1988, and February 1, 1990, and whether claimant served timely written claim for the accidents of January 25, 1985, and June 23, 1988, were raised before the Special Administrative Law Judge, but have not been appealed to the Workers Compensation Appeals Board. Therefore, the findings of the Special Administrative Law Judge with regard to those issues are adopted by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant sustained injury to his back on three separate occasions. The injury on January 25, 1985, was described as being in his upper back between his shoulder blades. The injuries to claimant in 1988 and 1990 were both described as being in claimant's low back, in the lumbar area.

It was stipulated at regular hearing that claimant was paid temporary total disability compensation for the 1985 injury for 57.76 weeks at \$197.00 per week, totaling \$11,378.54. This matter was contested by respondent at the oral argument before the Appeals Board. However, the parties stipulated to this sum at the time of regular hearing and that stipulation was never formally withdrawn. The Appeals Board has held in the past that stipulations by the parties, which are not withdrawn, will bind the parties in workers compensation litigation. The stipulated temporary total disability compensation of 57.76 will be attributed to the 1985 date of accident.

After the 1985 injury, claimant was provided medical treatment through October 1985, and again in June 1987, when he was treated by William Fulcher, M.D. Claimant returned to his regular employment subsequent to the 1985 injury and worked his regular job for an unspecified period of time until he had the opportunity to bid to a lighter, mixer-filler job. At the time claimant was returned to work in 1985, he was under no medical restrictions. Claimant contends that he is entitled to a substantial work disability under K.S.A. 1984 Supp. 44-510e and based upon the principles set forth in Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984). In Ploutz, the Supreme Court was asked to review the Court of Appeals' interpretation of the 1974 statutory provision dealing with workers compensation work disability. The Court found that work disability is "that portion of the job requirements that a worker is unable to perform by reason of an injury." *id.* at 955.

"The test for determining permanent partial general disability is the extent to which the injured worker's ability has been impaired to engage in work of the same type and character he or she was performing at the time of the injury." *id.* at 955.

". . . the pivotal question is, what portion of the claimant's job requirements is he or she unable to perform because of the injury?" *id.* at 955.

Here, claimant returned to work at his regular employment subsequent to the injury. While it is true claimant bid to a lighter job alleging ongoing pain symptomatology, the Appeals Board finds that claimant was under no medical restrictions at the time he returned to work in 1985 and suffered no loss in his ability to engage in work of the same type and character. Based upon the requirements of K.S.A. 1984 Supp. 44-510e and the

holdings of Ploutz, claimant is not entitled to a work disability as a result of the injury suffered January 25, 1985.

Claimant alleged that he should at least be entitled to a functional impairment for the injuries suffered in 1985. A review of the medical evidence shows that Sergio Delgado, M.D., and William T. Jones, M.D., both board-certified orthopedic surgeons, provided opinions regarding claimant's functional impairment. Dr. Jones assessed claimant a 12 percent whole body functional impairment, finding that 85 percent of this functional impairment was attributable to the 1985 injury. However, it is significant that claimant's injury in 1985 was to his upper back, between his shoulder blades. The functional impairment assessed by Dr. Jones deals with claimant's lumbar spine, which is the low back. There appears to be a significant difference of opinion regarding which part of claimant's body he injured in 1985. As Dr. Jones does not appear to have been fully versed on the injuries suffered by claimant in 1985, and as Dr. Jones did not begin treating claimant until April 1990, the Appeals Board finds the opinion of Dr. Jones regarding claimant's functional impairment to be less credible. Dr. Delgado was advised that the 1985 injury was to the thoracic area and not to the lumbar area. Dr. Delgado provided specific impairments for claimant's lumbar spine, but stated that claimant did not suffer permanent impairment to his thoracic or mid-back area. Therefore, the Workers Compensation Appeals Board finds claimant has not proven by a preponderance of the credible evidence any entitlement to a functional impairment as a result of the 1985 injury, and claimant is limited to claiming his temporary total disability and medical compensation for that injury.

Respondent raises, as a further defense, the rule set forth in Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, rev. denied, 260 Kan. ____ (1996), interpreting K.S.A. 44-501, which stated:

"Except for liability for medical compensation, . . . the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."

It is significant that Boucher was decided in 1996 and was asked to interpret certain changes made in K.S.A. 44-501 in 1975 and 1987. In 1975 the Kansas Legislature amended K.S.A. 44-501 by changing the period in question from two weeks to one and adding the language "Except for liability for medical compensation." Furthermore, until 1987 the Workers Compensation Act was liberally construed in order to pay workers compensation benefits to claimants whenever possible. This philosophy was substantially changed in 1987 when the legislature provided the following addition to K.S.A. 44-501.

“(g) It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.”

The Appeals Board, in considering the legislative changes to K.S.A. 44-501, finds that, of the changes made, the 1975 modifications are the more significant. The Kansas Court of Appeals in Boucher felt that these modifications were clear and unambiguous, and that the legislature was clarifying its intentions regarding the entitlement to compensation by an employee, when that employee does not lose time from work but has incurred medical expenses. In applying the principles set forth in Boucher, supra, the Appeals Board finds claimant was not disabled for a period of at least one week from earning full wages at the work at which he was employed as a result of the 1985 injury and, with the exception of liability for medical compensation, the respondent shall be relieved of liability for that injury.

After returning to work from the 1985 injury, claimant began working as a mixer-filler. He suffered a second injury to his low back on June 23, 1988. He advised his supervisor and began losing time from work. The parties acknowledge that claimant received temporary total disability compensation for this injury, but it is unclear from the record what portion of claimant's temporary total disability compensation was paid as a result of this injury. It is claimant's burden to prove his entitlement to benefits under the Workers Compensation Act. (See K.S.A. 1987 Supp. 44-501 and 44-508(g)). The Appeals Board finds claimant has failed in his burden of proving entitlement to temporary benefits as a result of this injury.

After injuring his low back in June 23, 1988, claimant was off work for a period of time. While claimant was off work, he submitted a bid to change to a super anhydrous job, which he felt would be lighter work. When claimant returned to work after the 1988 injury, he began working at the super anhydrous job. As stipulated by the parties, the claimant's 1985 average weekly wage was \$310.00 per week. The average weekly wage for claimant's June, 1988 injury is \$374.80. The average weekly wage for claimant's February 1, 1990, date of accident is \$392.80 without considering fringe benefits. It is clear claimant returned to work after his 1988 injury at a job which paid a comparable or greater wage.

K.S.A. 1987 Supp. 44-510e defined work disability as follows:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training,

experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

K.S.A. 1987 Supp. 44-510e goes on to state:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Claimant returned to work with respondent at a different job, but at a greater wage than claimant was earning at the time of the 1988 injury. As such, the Appeals Board finds that the presumption contained in K.S.A. 1987 Supp. 44-510e has not been overcome and claimant is limited to his functional impairment as a result of that injury.

The medical evidence in the record fails to provide a functional impairment for claimant's accident of June 23, 1988. As it is claimant's burden under K.S.A. 44-501 and K.S.A. 44-508(g) to prove his entitlement to benefits under the Workers Compensation Act, claimant would be limited to the medical treatment provided by respondent at that time for that injury.

On February 1, 1990, while filling bags of soiled product, claimant again suffered an injury to his low back. He was again taken off work and referred to several doctors, ultimately receiving treatment from William T. Jones, M.D. Claimant was paid temporary total disability compensation until November, 1990, at which time he returned to work for respondent. It is significant that while claimant returned to a different job after the 1990 injury, he also returned to a job which was a regular duty job and required no accommodation.

The Kansas Court of Appeals, in Watkins v. Food Barns Store, Inc., Docket No. 76,288 (April 18, 1997), found that a worker who returns to work performing the same job without accommodations for the same wages, following an injury, does not suffer a work disability unless his physical condition changes. In that opinion, the Court of Appeals found that work disability focuses on the reduction in a worker's ability to earn wages, not the actual wages lost. The Court of Appeals found that since the claimant was returned to the same job without accommodation, he would not be entitled to a work disability.

Here, claimant returned to work for respondent at a job that he bid into, which required no accommodation and paid a wage equal to or greater than that which claimant was earning at the time of the injury. Claimant continued working that job until the plant closed in April 1991. As such, following Watkins, the Appeals Board finds claimant entitled to a functional impairment as a result of the injury suffered on February 1, 1990. In Watkins, the Court of Appeals specifically limited the holding of Lee v. Boeing Company, 21 Kan. App. 2d. 365, 889 P2d 516 (1995), which applied the presumption of no work

disability to one period of time and allowed it to be overcome as to another period. Rather, the Court of Appeals found the Lee philosophy did not apply as the claimant in Watkins was able to return to an unaccommodated job at a comparable wage. In this instance, claimant returned to work with respondent without accommodation, at a comparable wage, and the holding of Watkins applies.

With regard to claimant's entitlement to functional impairment for the 1990 injury, the Appeals Board must consider the medical reports of Dr. Jones, Dr. Delgado, and Edward J. Prostic, M.D., all of whom had the opportunity to examine and/or treat the claimant for his low back injuries. Dr. Jones found claimant to have a 12 percent whole body functional impairment, all of which he attributed to the low back. While Dr. Jones was somewhat confused as to which particular date the injuries occurred, his opinion, nevertheless, does designate a specific functional impairment suffered by claimant. Dr. Delgado found claimant had suffered an 8 percent whole body functional impairment to the low back, and Dr. Prostic found claimant's low back impairment to be 3 to 5 percent. In giving equal weight to the opinions of all three orthopedic surgeons, the Appeals Board finds claimant has suffered an 8 percent whole body functional impairment as a result of the injury on February 1, 1990.

Therefore, with regard to claimant's entitlement to additional work disability, the Appeals Board finds the opinion of the Special Administrative Law Judge should be reversed, and claimant should be limited to his functional impairment for the above-stated reasons.

With regard to the amount of total temporary disability due and owing for the 1990 injury, the parties stipulated to 85.73 weeks paid totaling \$17,995.02. This stipulation was not withdrawn.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated March 12, 1997, should be, and is, hereby, modified and an award is made in favor of the claimant, Dennis Ball, and against the respondent, Georgia Pacific Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund for injuries suffered as follows:

For the injury suffered on January 25, 1985, claimant is entitled to 57.76 weeks of temporary total disability compensation at the rate of \$206.68 per week for a total of \$11,937.84.

For the injury suffered on June 23, 1988, claimant would be entitled to no temporary total disability compensation and no permanency. Claimant would, however, be entitled to medical treatment pursuant to the stipulations of the parties.

For the injury suffered on February 1, 1990, claimant would be entitled to 85.73 weeks of temporary total disability compensation in the total sum of \$17,995.02, followed by 329.27 weeks permanent partial disability compensation at the rate of \$25.03 per week, totaling \$8,241.63, for a total award for all three injuries of \$38,174.49.

As of August 20, 1997, claimant would be entitled to 57.76 weeks of temporary total disability compensation at the rate of \$206.68 in the amount of \$11,937.84, followed by 85.73 weeks of temporary total disability compensation in the sum of \$17,995.02, followed by 308.13 weeks permanent partial disability compensation at the rate of \$25.03 per week in the amount of \$7,712.49, making a total due and owing of \$37,645.35, which is ordered paid in one lump sum, minus the amounts previously paid.

Thereafter, claimant would be entitled 21.14 weeks of permanent partial disability compensation at the rate of \$25.03 per week in the amount of \$529.13 until fully paid or until further order of the Director.

Future medical may be awarded upon proper application to and approval of by the Director.

Unauthorized medical of up to \$350.00 for each accidental injury is ordered paid on behalf of the claimant upon presentation of proof of said expense.

Claimant's attorney fee contract is approved insofar as it is not inconsistent with K.S.A. 44-536.

Respondent is entitled to a reimbursement from Kansas Workers Compensation Fund for 65% of the total expenditures awarded for all three accidents.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are, hereby, assessed against the respondent and the Kansas Workers Compensation Fund, to be paid 65% by the Kansas Workers Compensation Fund and 35% by the respondent as follows:

William F. Morrissey	\$150.00
Special Administrative Law Judge	
Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of Preliminary Hearing	\$261.80
Transcript of Proceedings	\$ 86.90
Transcript of Regular Hearing	\$338.60
Appino & Biggs Reporting Service	
Transcript of Regular Hearing (Contd.)	\$229.00

Deposition of Sergio Delgado, M.D.	\$288.20
Deposition of Melodie Sedivy	\$589.20
Owens, Brake & Associates	
Deposition of William T. Jones, M.D.	\$383.10
Metropolitan Court Reporters, Inc.	
Deposition of Michael Dreiling	\$366.10
Deposition of Edward Prostic, M.D.	\$271.50
Robin J. Schuyler	
Deposition of Karen Terrill	\$269.75

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
James B. Biggs, Topeka, KS
Thomas D. Haney, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director